Supreme Court, U.S.
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No. 97-1269

IN THE

Supreme Court of the United States

October Term, 1997

ROBERT FICALORA,
Petitioner,
v.
INTERNATIONAL BUSINESS MACHINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION

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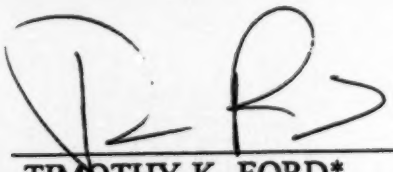
1. Respondent's Brief in Opposition conflates the medical record as it stood before petitioner was definitively diagnosed with multiple sclerosis (MS). Although IBM long refused to admit it, there is no longer any dispute that petitioner has MS, and it was conceded by respondent below. See Pet. App. A 7. The factual issue on which petitioner's entitlement to disability benefits turned -- first raised by IBM after petitioner's MS diagnosis was undeniable -- was whether MS disabled him from work. IBM denied benefits, saying it was not satisfied with petitioner's proof of disability. Ibid. Yet every physician that has rendered an opinion on that subject has said that petitioner is unable to work, or should retire, and no one has said he is able to work. See Pet. App. A 23-26.

2. The courts below were able to affirm IBM's decision only because they applied the most deferential standard of review. Even under that standard, one of the three judges of the Court of Appeals below would have reversed IBM's decision. See Pet. App. A 26. Under any less deferential standard, IBM's decision would almost certainly have been reversed. Therefore, contrary to respondent's submission, the standard of review was determinative of the outcome of this case below.

3. The standard applied by the courts below was exactly the same standard as they would have applied if IBM had not been burdened by a conflict of interest. Under the Ninth Circuit approach, once IBM produced some evidence that the conflict of interest did not affect its decision to deny benefits, its undeniable conflict no longer weighed in the balance. See Pet. App. A 6. This cannot reasonably be characterized as merely a "different approach" for meeting the requirement of Firestone v. Bruch, 489 U.S. 101 (1989) that a "conflict must be weighed as a factor in determining whether there is an abuse of discretion." 489 U.S. at 115. (emphasis added; internal punctuation and citation omitted). To the contrary, this all-or-nothing approach is "directly contrary to Supreme Court precedent established in Firestone v. Bruch." Armstrong v. Aetna, 128 F.3d 1263, 1266 (8th Cir. 1997) (Beam, J., dissenting).

4. Respondent may be correct that the split among the Courts of Appeals includes three or more distinct positions. Brief in Opposition, p. 8. However, if true, that hardly makes this case less appropriate for review under Rule 10(a). The lower courts are not experimenting with this standard; they are disagreeing about it. The Ninth Circuit is holding to its position despite the criticism of the other circuits and even its own District Courts below it. See Petition, pp. 11-12. The circuits are having this disagreement over a preemptive area of federal law that directly affects millions of workers and billions of dollars. It is the kind of disagreement this Court sits to resolve.

Respectfully submitted,



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